Supreme Court, U.S.
FILED
07-683 NOV 19 2007
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

GEORGE MOLINA LOPEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TERRY GODDARD
Attorney General

MARY O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

J.D. NIELSEN
Assistant Attorney General

ROBERT GORMAN
Assistant Attorney General
(Counsel of Record)
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542–4686

CAPITAL CASE

QUESTION PRESENTED

Lopez was sentenced to death for brutally murdering his one-year-old son. Following his direct appeal, Lopez challenged his trial counsel's effectiveness in a petition for post-conviction relief, and the state court conducted a 4-day evidentiary hearing to address Lopez' claims. When Lopez filed a federal habeas petition, he raised claims of ineffective assistance of counsel, but he alleged specific claims of ineffectiveness vastly different from those raised in state court. The district court held that the aspects of the ineffective assistance claims that had not been pursued in state court were barred by procedural default and rejected the remainder of the claims after finding that the state courts' denial of Lopez' post-conviction claim was not an unreasonable application of *Strickland v. Washington*.

On appeal to the Ninth Circuit, Lopez' counsel acknowledged that Lopez had procedurally defaulted portions of his ineffective assistance of sentencing counsel claim. Nevertheless, the Ninth Circuit found that the district court erred by finding procedural default as to any aspect of the ineffective assistance claim.

1. Did the Ninth Circuit disregard this Court's long-standing jurisprudence relating to the doctrines of exhaustion and procedural default when it determined that Lopez had properly exhausted all of his ineffective assistance of sentencing counsel claims?

2. Did the Ninth Circuit err by rejecting the district court's finding that Lopez did not establish a claim for relief under *Strickland*, when Lopez failed to establish in state court how he was prejudiced by counsel's alleged deficient performance, notwithstanding the opportunity to develop his claim in a 4-day evidentiary hearing?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF AUTHORITIES iii
OPINION BELOW 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL PROVISIONS 1
STATEMENT 3
REASONS WHY THE WRIT SHOULD BE GRANTED 7

I

The Ninth Circuit's Procedural Default Ruling Directly Conflicts With This Court's Long-Standing Jurisprudence That Requires Fair Presentation Of Claims In State Court Before They Can Provide A Basis For Relief On Federal Collateral Review 9

II

The Ninth Circuit's Ruling Directly Conflicts With *Strickland v. Washington* and Fails to Defer to a Reasoned State Court Determination 11

III

A Remand Will Waste Resources and Unnecessarily Delay the Case 13

CONCLUSION 17
APPENDIX A A-1
APPENDIX B B-1
APPENDIX C C-1
APPENDIX D D-1

TABLE OF AUTHORITIES

Cases — Page

Atkins v. Virginia, 536 U.S. 304 (2002) 14, 15
Baldwin v. Resse, 541 U.S. 27 (2004) 7, 10, 11
Coleman v. Thompson, 501 U.S. 722 (1991) 7, 9, 11
Duncan v. Henry, 513 U.S. 364 (1995) 9
Gray v. Netherland, 518 U.S. 152 (1996) 7, 10, 11
Lopez v. Schriro, 491 F.3d 1029 (9th Cir. 2007) 1, 12, 14
O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 7, 11
Picard v. Connor, 404 U.S. 270 (1971) 7, 9, 11
Roper v. Simmons, 125 S. Ct. 1183 (2005) 14, 15
State v. Lopez, 174 Ariz. 131, 847 P.2d 1078 (1992) 3
Strickland v. Washington, 466 U.S. 688 (1984) ..... passim
Yarborough v. Gentry, 540 U.S. 1 (2003 8

Statutes

A.R.S. § 13-4031 10
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2254(e) 17
28 U.S.C. § 2254(e)(2) 8, 14
28 U.S.C. § 2254(e)(2)(A)(ii) 14

Rules

Rule 32.9(c), Ariz.R.Crim.P. 10
Rule 32.9(c)(1)(ii)(iii), Ariz.R.Crim.P. 10

Constitutional Provisions

U.S. Const. art. III, § 2 1
U.S. Const. amend. VI 1
U.S. Const. amend. VIII 1, 14
U.S. Const. amend XIV 2

OPINION BELOW

A panel of the United States Court of Appeals for the Ninth Circuit (Judges Hawkins, Thomas, and Clifton) held that Lopez' ineffective assistance of counsel at sentencing claim was exhausted in state court and should not have been dismissed on procedural grounds. *Lopez v. Schriro*, 491 F.3d 1029 (9th Cir. 2007) (Pet. App. B, at 1041.) The opinion reversed, in part, the decision of the United States District Court for the District of Arizona and remanded the case to the district court. *Lopez v. Schriro*, No. CV-97-2245-TUC-CKJ (Pet. App. B, at C.) The district court previously issued a procedural order on December 3, 1999. (Pet. App. D.)

STATEMENT OF JURISDICTION

The Ninth Circuit denied Petitioner's request for rehearing en banc on August 21, 2007. (Pet. App. A, at 1.) This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

George Lopez beat his 12-month-old son, Anthony, so severely that he fractured the child's skull in two places, using such force that the skull was driven into the brain. *State v. Lopez*, 174 Ariz. 131, 134-35, 143-44, 847 P.2d 1078, 1081-83, 1090-91 (1992). Lopez also fractured the infant's tenth and eleventh ribs near the spine (the autopsy showed three other partially healed fractured ribs that had been broken in the past). *Id.* The baby's pancreas had been torn in two. The beating also lacerated the baby's bowel; the membrane that holds the bowel in place; the spleen, and the adrenal gland. *Id.* When the child's mother, who had been out shopping, asked to take the baby to the hospital, Lopez refused to do so until several hours later when the baby had stopped breathing. *Id.* at 134-35, 847 P.2d at 1081-82.

A jury convicted Lopez of first-degree child abuse and first-degree murder, and Pima County Superior Court Judge Margaret Houghton sentenced him to death after finding that the murder was especially cruel, heinous, or depraved, and that the mitigation presented was not sufficiently substantial to warrant leniency. *Id.* at 136-37, 847 P.2d at 1083-84. The Arizona Supreme Court upheld Lopez' death sentence, noting that Lopez' primary mitigation of being a good parent, caring for children, and not acting inappropriately with them was rebutted by a prior conviction for child molestation. *Id.* at 143-45, 847 P.2d at 1090-92.

On July 6, 1994, Lopez filed a petition for post-conviction relief in the trial court. Among other arguments, he raised seven particular claims of ineffective assistance of counsel, asserting specifically: (1) Trial and appellate

counsel were ineffective for failing to challenge admission of prior bad acts; (2) Trial and appellate counsel were ineffective for failing to challenge a replica of Lopez' bedroom in the courtroom; (3) Trial counsel was ineffective for failing to object to the timing of the State's election to proceed on felony murder only; (4) Trial and appellate counsel were ineffective for failing to object to (or request) various jury instructions; (5) Trial and appellate counsel were ineffective in failing to challenge prosecutorial misconduct in opening and closing arguments; (6) Trial counsel was ineffective in opening statement and closing argument; and (7) Trial counsel was ineffective for not requesting the trial court to list all the mitigating circumstances offered and the reasons for rejecting them.

Lopez subsequently added a claim that trial counsel was ineffective for failing to call a psychiatrist or psychologist to explain Lopez' apparent lack of emotion and his inconsistent statements to the police as being the result of cultural and individual expressions of grief. Notably absent from Lopez' post-conviction petition were any claims of ineffective assistance of sentencing counsel.

The trial court conducted an extensive 4-day evidentiary hearing, during which the defense called a clinical psychologist, as well as trial and appellate experts, among other witnesses. At the conclusion of the hearing, Lopez filed a "Memorandum in Support of Post-Conviction Relief," reiterating the claims presented to the state court and adding claims that had been developed in the evidentiary hearing. The memorandum alleged ineffectiveness based on counsel's failure to object to prior bad act evidence of the victim's previous injuries, counsel's failure to "explain" Lopez' inconsistent statements to the police through expert testimony on the effects of grief, and

for having failed to object to the "circus-like" atmosphere at trial created by the presence of a replica of Lopez' bedroom. The defense presented two additional claims that it acknowledged had not been included in the post-conviction petition: (1) Counsel's failure to file a notice of change of judge, and (2) Counsel's ineffectiveness at sentencing "for all appearances" of having delegated the mitigation preparation to allegedly less-qualified co-counsel, and for having failed to give "direction" to Dr. Morris, the testifying expert at sentencing, to evaluate Lopez in a manner that would "help the case," especially by providing an opinion on Lopez' inconsistent statements to law enforcement. Lopez also faulted counsel for focusing at trial on lesser-included offenses to premeditated murder, only to be "surprised" when the State made a mid-trial election to proceed solely on felony murder. Lopez did not, however, provide any information regarding what relevant mitigation existed that counsel failed to investigate and/or present at sentencing.

After the trial court denied relief, Lopez filed a petition for review in the Arizona Supreme Court, and he included an issue entitled "Abandonment [sic] his client at the trial and/or sentencing stages." The entire argument relating to this issue encompassed one paragraph:

> Additionally, Mr. Bruner for all appearances turned over the mitigation preparation to Ms. Marshall, his junior counsel, who had previously done no serious trials including murder and/or death penalty trials. Mr. Bruner gave no direction to Dr. Morris [mental health expert] as to the evaluation, other than Mr. Bruner wanted to know about "overall personality dynamics,

> and things of this nature. Wasn't asking for anything specific to help the case, but was interested in learning more about the psychological makeup of Mr. Lopez." (Transcript of May 2, 1995, at 63.) Most importantly, Dr. Morris was not asked to evaluate or render an opinion as to the statements given by Mr. Lopez to law enforcement. (May 2, 1995, at 66.) Mr. Bruner believed that the death penalty would not be imposed in this case and prepared accordingly.[1]

After the Arizona Supreme Court and this Court summarily denied review of the post-conviction proceedings, Lopez filed a petition for writ of habeas corpus in federal district court alleging claims that included specific assertions of ineffective assistance of counsel: (A) Failure to adequately prepare and present evidence to rebut the (F)(6) aggravating factor; (B) Failure to investigate and present six types of mitigation evidence: (1) organic brain damage; (2) lack of intent to kill due to organic brain damage; (3) dysfunctional childhood; (4) childhood sexual assault; (5) good employment record, and (6) remorse; (C) Failure to object to presentation by the State of the victim's suffering caused by old injuries not attributable to Lopez; (D) Failure to adequately investigate cause of the victim's

---

[1] At the state court evidentiary hearing, Attorney Bruner testified that he "would always have a client evaluated for any possible mitigation," and that he did not provide "directions" to Dr. Morris, because the psychologist "was someone who came very highly recommended as somebody who knew this area of the law, and . . . someone who knew psychology." Bruner did not expect the death penalty to be imposed, "because we felt we were very prepared to present good mitigation on behalf of George [Lopez]."

injuries; (E) Failure to conduct an adequate pre-trial investigation as to Lopez' diminished capacity; (F) Failure to move for preclusion of prior instances of abuse suffered by victim; (G) Failure to object to removal for cause of venireperson; (H) Failure to object to replica of bedroom in the courtroom; (I) Failure to object to irrelevant and prejudicial facts; (J) Cumulative effect of counsel's deficiencies at trial and sentencing; and (K) Failure of appellate counsel to raise numerous significant issues. The district court found that Claims 12(F), (H), and (K) were properly exhausted and appropriate for review on the merits. The district court found the remaining ineffective assistance claims procedurally barred. (Pet. App. D, at 46.)

The Ninth Circuit reversed the district court' decision and found that Lopez has exhausted every aspect of his ineffective assistance claim by making "general allegations of his counsel's lack of penalty phase preparation to the Arizona Supreme Court." (Pet. App. B, 491 F.3d at 1041.)

Lopez filed his federal habeas petition in March, 1997, after the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Thus, this case is governed by the provisions of the Act.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case merits review by this Court because the Ninth Circuit disregarded this Court's long-standing jurisprudence relating to the doctrines of exhaustion and procedural default set out in *Picard v. Connor*, 404 U.S. 270 (1971), *Coleman v. Thompson*, 501 U.S. 722 (1991), *Gray v. Netherland*, 518 U.S. 152 (1996), *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), and *Baldwin v. Resse*, 541 U.S. 27 (2004). Contrary to the Ninth Circuit's assertion, a general claim of ineffective assistance of counsel does not exhaust every

conceivable form of ineffective assistance. By failing to assert in state court the specific allegations of ineffectiveness for which he now seeks relief, Lopez has procedurally defaulted those aspects of his claim.

To the extent Lopez is deemed to have exhausted his ineffective assistance of counsel claim in state court, the state courts' denial of relief in Lopez' post-conviction proceedings was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 688 (1984), because, notwithstanding a 4-day evidentiary hearing, Lopez never established in state court what mitigation evidence was available that would have changed the sentencing decision. Lopez has thus failed to satisfy the prejudice prong of the *Strickland* analysis and the state court's ruling denying his ineffective assistance of counsel claim should be upheld under any standard of review, much less the "doubly deferential" standard required under the AEDPA when review is conducted through the lens of federal habeas. *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

The Ninth Circuit's order remanding the case to the district court will result in a waste of valuable resources because Lopez' ineffective assistance of counsel claim stands or falls based on the information that is already before the court. Lopez has not established a basis for further evidentiary development in federal court because he was given ample opportunity, including a lengthy evidentiary hearing, to develop his claim in state court. *See* 28 U.S.C. § 2254(e)(2) (federal court "shall not hold an evidentiary hearing" on a claim "if the applicant has failed to develop the factual basis of the claim in State court proceedings"). Thus, the Ninth Circuit's remand will result in a waste of valuable judicial resources, forcing the district court to reconsider a claim that Lopez failed to first establish as colorable under *Strickland* in state court.

I. The Ninth Circuit's Procedural Default Ruling Directly Conflicts With This Court's Long-Standing Jurisprudence That Requires Fair Presentation Of Claims In State Court Before They Can Provide A Basis For Relief On Federal Collateral Review.

Lopez' failure to present in state court allegations that counsel should have investigated organic brain damage, lack of intent to kill due to organic brain damage, dysfunctional childhood, childhood sexual assault, good employment record, or remorse, precludes review of those allegations on federal collateral review. In *Picard*, this Court held:

> Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with *the same claim* he urges upon the federal courts.

404 U.S. at 276 (emphasis added, internal citation omitted). In *Coleman*, this Court further pointed out that "a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." 501 U.S. at 731. *See also Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (prisoner must do more than demonstrate that he made a "somewhat similar" state law claim).

In addition to Lopez' failure to present his current theory of ineffective assistance of sentencing counsel to the

trial court as part of his post-conviction proceedings, his failure to properly present his claim to the Arizona Supreme Court following proceedings in the trial court add another layer of procedural default. Lopez' petition for review in the Arizona Supreme Court did not reference any of the mitigation-related ineffective assistance of counsel concerns Lopez is pursuing in federal court. Thus, the Arizona Supreme Court was not provided the opportunity to consider those assertions in denying review, and Lopez failed to exhaust that aspect of his claim.

Under the Arizona Rules of Criminal Procedure, a petition for review must include both the issues decided by the trial court and the material facts needed to decide those issues. *See* Ariz.R.Crim.P. 32.9(c) and Ariz.R.Crim.P 32.9(c)(1)(ii)(iii). The general statements raised in Lopez' petition for review did not alert the Arizona Supreme Court to the factual predicate of the claim he is attempting to pursue in federal court. *See Baldwin*, 541 U.S. at 32 (claim not fairly presented when state court "must read beyond a petition or a brief" to find "the presence of a federal claim"); *see also Gray*, 518 U.S. at 163 (federal claims must be first raised in state court with specificity). In order to exhaust state remedies, Lopez was required to present his ineffective assistance claim to the Arizona Supreme Court. A.R.S. § 13-4031 (capital case post-conviction proceedings are appealed directly to the Arizona Supreme Court). His failure to do so with specificity is fatal to his current claim:

> Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking

> one complete round of the State's established appellate review process.

O'Sullivan, 526 U.S. at 845.

Even assuming Lopez' petition for post-conviction relief can be construed to contain specific allegations of ineffective assistance of sentencing counsel, his less specific petition for review failed to put the Arizona Supreme Court on notice of the substance of his federal claims. The only claim Lopez "exhausted" by means of his petition for review was a general assertion that counsel turned over mitigation preparation to co-counsel and failed to give adequate direction to the mental health expert that testified on Lopez' behalf at trial and sentencing. Lopez did not exhaust any asserted prejudice under *Strickland*, *i.e.* how the sentencing result would have changed had counsel done more. Because Lopez did not raise the substance of his current ineffective assistance of sentencing counsel claim before the Arizona Supreme Court in a procedurally correct manner—something conceded by Lopez' federal habeas counsel—the Ninth Circuit's exhaustion ruling is directly contrary to *Picard*, *Coleman*, *Gray*, *O'Sullivan*, and *Baldwin*.

II. The Ninth Circuit's Ruling Directly Conflicts With Strickland v. Washington And Fails To Defer To A Reasoned State Court Determination.

To the extent Lopez' ineffective assistance of sentencing counsel claim is not procedurally defaulted, it is not colorable, and the state courts' rejection of Lopez' ineffective assistance claim on the merits was entirely consistent with *Strickland*. Under *Strickland*, a defendant must demonstrate that his sentence would have likely been

different had counsel done something more. 466 U.S. at 690 (in order to determine whether a petitioner was prejudiced by his counsel's deficient performance, he must first identify the particular acts or omissions that are alleged to have been the result of unreasonable professional judgment).

Notwithstanding an opportunity for evidentiary development in a lengthy hearing, Lopez never explained what type of evidence could have been provided that would have changed the outcome of his sentencing proceeding. Thus, he did not establish a colorable claim under *Strickland.*

In reversing the district court's ruling, the Ninth Circuit stated:

> We conclude that the district court erred by determining that Lopez's ineffective assistance of counsel claim was unexhausted. *Lopez did at least make the general allegations of his counsel's lack of penalty phase preparation to the Arizona Supreme Court* (including improper delegation to an inexperienced subordinate and failure to prepare mental health experts), and the state court record contains some evidence of a dysfunctional childhood and alcoholism. (Emphasis added.)

(Pet. App. B, *Lopez, 491 F.*3d at 1041. However, "general allegations" of ineffectiveness do not establish a colorable claim of ineffective assistance under *Strickland*, *see* 466 at 690. Accordingly, assuming *arguendo* Lopez exhausted a general claim in state court, the "general allegations" of his counsel's lack of penalty phase preparation do not establish a colorable claim, and the state courts' rejection of all of Lopez' assertions of ineffective assistance of counsel was not an

unreasonable application of federal law, as established by this Court.

III. A Remand Will Waste Resources and Unnecessarily Delay the Case.

The Ninth Circuit's decision sends the case back to the district court for consideration of the merits of a claim that is not colorable. Unless Lopez is granted an opportunity to develop new information that was not presented in state court, his ineffective assistance of counsel claim will remain in the same posture that it is currently in—it is not colorable under *Strickland* and does not entitle Lopez to relief.

In a footnote in the opinion, the Ninth Circuit stated:

> We note that Lopez apparently wishes to supplement the record in federal court with additional evidence of prejudice—information that could have been presented in the penalty phase mitigation proceeding, but was not presented due to defense counsel's allegedly deficient performance—that was not presented to the state courts. On remand, the district court will therefore need to determine whether Lopez, who received an evidentiary hearing in state court, is entitled to supplement the record or receive an additional evidentiary hearing in federal court. *See* 28 U.S.C. § 2254(e)(2); 28 U.S.C. foll. § 2254, R. 7 (setting forth the rule for expanding the record on federal habeas review).

Lopez, 491 F.3d at 1041, fn. 8. However, the footnote in fact demonstrates why remand is unwarranted. Under 28 U.S.C.

§ 2254(e)(2)(A)(ii), a habeas petitioner who has failed to develop the factual basis of a claim in State court proceedings is *not* entitled to an evidentiary hearing unless the petitioner establishes "a factual predicate that could not have been previously discovered through the exercise of due diligence." Here, Lopez has never asserted that there is a factual predicate that could not have been previously discovered. He was granted a 4-day evidentiary hearing in state court to do just that, yet he did not try to establish the existence of any specific items of mitigation the Ninth Circuit posits may be available to him.

Because there is no basis for granting an evidentiary hearing under § 2254(e)(2), the evidence will remain the same and Lopez is left with a *Strickland* claim that is not colorable.

Furthermore, the district court has already addressed and rejected Lopez' request to amend his habeas petition to raise four additional claims, including a claim (Claim 16) that his execution would violate the Eighth Amendment prohibition against cruel and unusual punishment because he suffers from brain damage that substantially diminished his culpability for the crime. (Pet. App. C, at 52.) Lopez submitted two affidavits from mental health professionals that opine that Lopez *possibly* suffers from brain damage, and that he was thus entitled to relief based on the rationale of *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that it is unconstitutional to execute the mentally retarded), and *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (holding that it is unconstitutional to execute a person who was a juvenile at the time of the capital offense).

After rejecting Lopez' *Atkins* and *Roper* arguments, the district court further ruled:

Moreover, the record simply does not support Petitioner's contention that he suffers from a legally significant brain impairment. The first of the affidavits Petitioner relies upon points to the opposite conclusion. Mitigation specialist O'Dowd states that:

> [Petitioner] had an excellent work history. He had been continuously employed throughout nearly all of his adult life. He was honorably discharged from both the U.S. Army and the National Guard. He also obtained specialty training and employment in heating/cooling and refrigeration. He worked for the City of Tucson from 1977 to 1987. At the time of the incident, he was employed as a safety technician/flag man at Cyprus Mine. He had been working everyday for at least a month, with shifts lasting up to 12 hours.

The second affidavit concludes only that Petitioner is a "candidate for organic brain damage" based on counsel's representations. The affiant, Dr. Thompson, never interviewed Petitioner nor reviewed anything about his medical, family, or educational background in making this assessment.

Further, to the extent Proposed Claim 16 alleges ineffective assistance of counsel, the state court found it precluded under Rule 32.2(a)(3). Therefore, it is procedurally

> defaulted and barred from review in this Court, absent a showing of legitimate cause for the failure to properly exhaust in state court and prejudice from the alleged constitutional violation, or that a fundamental miscarriage of justice would result if the claim were not heard on the merits in federal court. *See Coleman*, 501 U.S. at 735 n.1. Despite having the opportunity, Petitioner has failed to allege either exception to overcome the default. Accordingly, the Court finds amendment to add Claim 16 would be futile *and is denied.*

(*Id.* at C 52–53)(citation omitted.)

The Ninth Circuit's footnote 8 ignores this ruling by the District Court and ignores the fact that there is no basis for permitting Lopez to supplement the record, given that he could have presented the information at issue at his evidentiary hearing in state court, but did not do so. Accordingly, sending the case back to the district court will be an exercise in futility, with the district court simply left to again assess the viability of a non-colorable *Strickland* claim.

Finally, Lopez was convicted and sentenced more than 17 years ago, and his case has been in federal court for over a decade. The Arizona courts gave Lopez ample opportunity to develop his claims, providing qualified counsel at every stage, including during post-conviction proceedings. Sending this case back to the district court under the circumstances outlined above will waste judicial and governmental resources, and will thwart the interests of justice, as well as the State's and crime victim's interest in finality.

The district court's finding of procedural default is clearly supported by the record, and the Ninth Circuit's decision not only ignores that record, but also a concession by Lopez' habeas counsel regarding significant portions of his ineffective assistance claim. This Court should intervene to prevent further delay unrelated to a viable claim for relief.

CONCLUSION

The Ninth Circuit misconstrued this Court's long-standing jurisprudence, as well Arizona law, when it found that Lopez' general allegations of his counsel's ineffectiveness at sentencing in a petition for review to the Arizona Supreme Court exhausted all conceivable assertions of ineffective assistance of sentencing counsel, including matters never raised or discussed in state court. Lopez in fact procedurally defaulted aspects of his ineffective assistance claims that were not presented in state court, and the remaining, properly exhausted portions of the claims do not create a colorable claim for relief under *Strickland*.

Remanding the case will be an exercise in futility, because Lopez cannot establish a basis under 28 U.S.C. § 2254(e) for further developing evidence that clearly could have been developed during a state court evidentiary hearing. On remand, the district court will thus be faced with the same non-colorable claim of ineffective assistance of counsel it previously addressed. Accordingly, this Court should accept certiorari review and reverse the decision of the Ninth Circuit.

Respectfully submitted

TERRY GODDARD
Attorney General

MARY O'GRADY

Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

J.D. NIELSEN
Assistant Attorney General
ROBERT GORMAN
Assistant Attorney General
(Counsel of Record)

Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542–4686